1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   KEVIN ABBOTT,   :

4   Petitioner   :   No. 09-479

5   v.   :

6   UNITED STATES   :

7   - - - - - - - - - - - - - - - - - x

8   and

9   - - - - - - - - - - - - - - - - - x

10   CARLOS RASHAD GOULD,   :

11   Petitioner   :

12   v.   :   No. 09-7073

13   UNITED STATES   :

14   - - - - - - - - - - - - - - - - - x

15   Washington, D.C.

16   Monday, October 4, 2010

17

18   The above-entitled matter came on for oral

19   argument before the Supreme Court of the United States

20   at 11:06 a.m.

21   APPEARANCES:

22   DAVID L. HORAN, ESQ., Dallas, Texas; on behalf of

23   Petitioner in No. 09-7073; appointed by this Court.

24   JAMES E. RYAN, ESQ., Charlottesville, Virginia; on

25   behalf of Petitioner in No. 09-479.

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1   ROY W. MCLEESE, ESQ., Acting Deputy Solicitor General,

2   Department of Justice, Washington, D.C.; on behalf of

3   Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next in Case 09-479, Abbott v. United States

5   and the consolidated case, 7073, Gould v. United States.

6   Mr. Horan.

7   ORAL ARGUMENT OF DAVID L. HORAN

8   ON BEHALF OF THE PETITIONER IN NO. 09-7073

9   MR. HORAN: Mr. Chief Justice, and may it

10   please the Court:

11   The statutory interpretation question here

12   is what laws trigger section 924(c)(1)(A)'s except

13   clause. Mr. Gould offers an interpretation that gives

14   meaning and effect to every word and phrase of section

15   924(c)(1)(A) and follows this Court's recent holdings

16   regarding the broad scope of the phrase "any other

17   provision of law."

18   The Government, on the other hand, advocates

19   a narrow construction that is not supported by the text

20   and defends it primarily on the basis that section

21   924(c) supposedly should always produce the most severe

22   minimum sentence for every defendant.

23   Respectfully, the Government's

24   interpretation is incorrect. Its reading gives no

25   practical effect to the phrase "any other provision of

4

1   law," and the Government has not cited and has yet to

2   even attempt to distinguish this Court's recent

3   interpretation of the very same phrase, "any other

4   provision of law," in Republic of Iraq v. Beaty just

5   last year.

6   Unlike the Government's, Mr. Gould's

7   interpretation is true to the text, is true to this

8   Court's holdings, and it's true to Congress's evident

9   purpose in 924(c)(1)(A), and in particular in its except

10 clause.

11   JUSTICE ALITO: Well, if the text of this is

12 so clear, how is it that Mr. Gould and Mr. Abbott

13 proposed different interpretations of this provision?

14   MR. HORAN: Your Honor, as a judicial

15 matter, I would note that I think our interpretations

16 are not that far apart.

17   JUSTICE ALITO: But they are not the same,

18 are they?

19   MR. HORAN: They are not. And our

20 interpretation, we believe, is the closest to the actual

21 text. Our interpretation requires reading no language

22 into the text. It --

23   JUSTICE ALITO: Isn't it -- there is a

24 missing prepositional phrase in this -- in the provision

25 that we are looking at.

1   It says, "except to the extent that a

2   greater minimum sentence is otherwise provided." For

3   what? And all of you have to -- are filling in the

4   prepositional phrase. For an offense of conviction,

5   for -- for an offense that's part of the underlying

6   transaction, for a violation of this particular

7   provision or one that's very similar to it.

8   There is just no way of getting around the

9   fact that something has to be read in there. Something

10   is implied; isn't that right?

11   MR. HORAN: Your Honor, respectfully, I

12   believe under our interpretation, it -- there is -- you

13   do have to understand something to be in there, but we

14   are not actually reading anything into the text. That

15   is the reason -- to be sure, the words "any kind of

16   conviction" are not in there.

17   However, the most natural reading of the

18   text, without adding anything to it, is that

19   924(c)(1)(A) requires a five-year -- at least a

20   five-year minimum sentence, in addition to any sentence

21   for the predicate drug trafficking or violent crime,

22   except to the extent that a greater minimum sentence is

23   provided for the defendant by subsection 924(c) or by

24   any other provision of law.

25   JUSTICE GINSBURG: So that means there would

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1   be no punishment, added punishment, at all for the

2   possession of the gun; that is, you have the possession

3   with intent to distribute, no gun involved, and you get

4   ten years mandatory minimum for that. That

5   automatically would wipe out any add-on for the gun,

6   under your reading.

7   MR. HORAN: Yes. Yes, Justice Ginsburg. To

8   follow on that, it is true that our interpretation -- we

9   think that the plain text dictates that if the except

10   clause is triggered, the lesser mandatory minimum

11   sentence under 924(c)(1)(A) shall not be imposed; that

12   is --

13   JUSTICE SOTOMAYOR: I'm sorry. You keep

14   saying that you are not reading anything into the

15   statute under your interpretation, but you are. You are

16   limiting the -- the "any other provision of law" to any

17   other provision of law specified in the charging -- in

18   the counts of conviction, correct?

19   MR. HORAN: That is the -- yes, Your Honor.

20   We are recognizing that limitation.

21   JUSTICE SOTOMAYOR: So you -- you said to

22   Justice Alito that you weren't reading anything in, but

23   you are. You are reading into it that the other

24   provision of law to refer to counts of conviction at

25   sentencing, correct?

1   MR. HORAN: That is correct, Your Honor.

2   JUSTICE SOTOMAYOR: All right. So why is

3   that read-in logical, meaning it's giving no extra

4   punishment for the possession of a firearm?

5   MR. HORAN: Your Honor, two things --

6   JUSTICE SOTOMAYOR: Which is, I think,

7   Justice Ginsburg's.

8   JUSTICE GINSBURG: Yes. I think you weren't

9   finished answering my question.

10   MR. HORAN: If I may, and I think it will

11   help in answering your question, Justice Sotomayor, that

12   is correct. The only thing I would say, the thing I

13   would additionally say, though, is that there is -- in

14   the sentencing guidelines, which must be applied even

15   now, as -- to provide a recommended range, there would

16   in each of these instances be a firearm enhancement that

17   enhances the underlying predicate offenses' sentence

18   that the defendant would be facing and how the district

19   court would work. So I believe --

20   JUSTICE GINSBURG: But that is not

21   mandatory?

22   MR. HORAN: That is no longer mandatory.

23   That is correct.

24   And then with regard to your question,

25   Justice --

1   JUSTICE GINSBURG: So you are saying that

2   the gun possession could be accounted for by the judge

3   as a matter of discretion using guidelines, but there is

4   no mandatory at all?

5   MR. HORAN: Yes, Your Honor. That is

6   correct. There would no longer be a mandatory sentence

7   for -- mandatory additional punishment for the firearm

8   possession.

9   JUSTICE SCALIA: And I suppose the

10   prosecution can alter the consequence based on what it

11   chooses to bring in a single prosecution.

12   I mean, if it has a -- other enhancements,

13   it should bring a separate prosecution for that. So

14   long as it brings it in one suit, you say, in one

15   prosecution, you get the break. But if -- if the other

16   enhancement is brought -- has been brought in a separate

17   prosecution, you don't get it.

18   MR. HORAN: Justice Scalia, I think that's

19   correct to an extent. The main exception to that, and I

20   think it's a significant one, is that the except clause

21   would most often be triggered in the majority of cases

22   by the predicate drug trafficking or violent crime that

23   carries with it a greater mandatory minimum sentence

24   that is, for double jeopardy purposes, the same offense

25   as 924(c).

1   So, in fact, there is a significant

2   constraint on the prosecution, that it cannot bring a

3   separate prosecution for 924(c) and its predicate drug

4   or trafficking -- drug trafficking or violent crime. So

5   it's a significant limitation on this --

6   JUSTICE SCALIA: Yes. Yes, I understand

7   what you are saying.

8   MR. HORAN: Okay. And Justice Sotomayor, to

9   return to your question, if I could answer it in two

10   parts. First -- and I didn't mean to overstate, if I

11   did -- we are not reading additional language into it.

12   Our reading is contained within the context and the

13   actual text that -- that is confined to section 924(c).

14   JUSTICE SOTOMAYOR: Explain how, because you

15   just said to Justice Scalia that if the mandatory

16   minimum is in a separate charging instrument, then it

17   doesn't affect you at all. It only affects you if the

18   count is in a count of conviction at sentencing.

19   MR. HORAN: Yes, Your Honor. That's

20   correct.

21   JUSTICE SOTOMAYOR: So what in the language

22   of 924(c) sets forth that limitation?

23   MR. HORAN: Your Honor, I would say that it

24   is the words "is otherwise provided" and the context in

25   which any textual reading --

10

1   JUSTICE SOTOMAYOR: Well, their "otherwise

2 provided by law" could be Federal, State laws. It could

3 be in the indictment, not in the indictment. You are

4 proposing that we limit this somehow, but I want to see

5 what the language is that you are relying upon to limit

6 it.

7   MR. HORAN: Your Honor, it is -- first of

8 all, the statute begins by directing the defendant -- I

9 mean, directing the district court to any person. So

10 they are focusing on the defendant. That is the offense

11 defining provision, to be sure, of the sentence.

12   But throughout the text, it also directs the

13 district court to take account of minimum sentences that

14 are provided for other crimes; for instance, primarily

15 the predicate --

16   JUSTICE SOTOMAYOR: In relationship to what?

17 Isn't that the Government's argument, which is that you

18 have to say in relationship to something, whether it's

19 the indictment or, as the Government would have it, in

20 relationship to the possession or carrying of a firearm?

21 Why isn't that the more natural reading?

22   MR. HORAN: Your Honor, because that --

23 because the statute as a whole is essentially

24 instructions to the district court on how to sentence

25 the defendant, if at all, for the 924(c)(1)(A) offense.

11

1   It directs them to, after considering the

2   person in front of them, to impose a sentence of five

3   years or less, in addition to the predicate -- any

4   penalty for the -- the predicate drug trafficking or

5   violent crime, except to the extent that a greater

6   minimum sentence is otherwise provided.

7   The natural reading of that is -- must be

8   that it is a -- a greater minimum sentence is provided

9   for that defendant; that is, before the particular

10   district court with the particular offenses that he has

11   before him at sentencing.

12   JUSTICE GINSBURG: Don't most crimes of

13   violence and drug trafficking carry more than a

14   five-year sentence?

15   MR. HORAN: Many of them do, Your Honor. In

16   fact, those that carry a mandatory minimum sentence

17   largely carry -- all carry, in fact, ten years.

18   There are some -- there are some both

19   predicate drug trafficking offenses and predicate

20   violent crimes that carry either no minimum at all or a

21   mandatory minimum of five years or less, and so would

22   not trigger the except clause.

23   JUSTICE SCALIA: So let's suppose somebody

24   commits a rape and a maiming in the same criminal act.

25   You are saying that the prosecution -- and let's assume

12

1   it's his third. It's his third violent crime. So he

2   would get the enhancement as being, you know, a

3   three-time violent crime loser.

4   You are saying he could get that enhancement

5   and the enhancement under this -- under this gun -- he

6   had a gun at the same time. He can get it if the

7   prosecution charges rape in one prosecution, for which

8   he will get the three-time loser enhancement, and then

9   in a separate prosecution, it charges maiming and the

10   use of a firearm. Then he gets both enhancements,

11   right?

12   MR. HORAN: That's correct, Your Honor.

13   JUSTICE SCALIA: That seems --

14   JUSTICE BREYER: I'm not sure that that's

15   right. I think that this may well apply to the crime

16   that is being -- that is being prosecuted where the

17   crime is defined as a real offense in the world, with

18   the limitations put on that term by the guidelines. I

19   would think that would be a natural reading, in which

20   case you would look to the conduct of the person.

21   And if the conduct of the person is such

22   that it calls for a mandatory minimum of a certain kind,

23   there we are. If that exceeds this amount, there we

24   are. You can't apply it. And if it doesn't, you do

25   apply it.

13

1   MR. HORAN: Yes.

2   JUSTICE BREYER: Have you looked into that?

3   I mean, that was my reading of it as -- in the most

4   natural way. The word "crime" is ambiguous. Sometimes

5   it means words in a statute. Sometimes it means an

6   affair in the world. And I thought this one probably

7   meant the affair in the world.

8   MR. HORAN: In answering your question,

9   Justice Breyer, and in answering Justice Scalia's

10   question, my assumption was that there were, in fact,

11   mandatory minimums such that this would play out with

12   one being greater than the other.

13   JUSTICE SCALIA: He's disagreeing with you.

14   He -- your theory -- you are not reading a crime to mean

15   an affair in the world. You are reading it to mean a

16   particular prosecution for a particular violation of a

17   statute. Right?

18   MR. HORAN: No, that's correct.

19   JUSTICE SCALIA: Well, read it that way. If

20   he wants to read it as an affair in the world, what --

21   JUSTICE BREYER: If that's so, then this

22   gives tremendous power to the prosecutor to decide what

23   the sentence will be in terms of how he manipulates the

24   charge. And I thought that probably this, read with the

25   guidelines, is designed not to -- not to permit that.

1   It's to minimize the discretion, not to maximize.

2   MR. HORAN: Your Honor, there will be

3   circumstances in which the prosecutor for the

4   Government, based on how it makes its charging

5   decisions, can affect the floor that's created by the

6   minimum sentence.

7   It's a different situation than Deal, which

8   is actually determinant sentences. It's not actually a

9   circumstance where the Government can determine the

10   punishment itself. That would still be to the district

11   court.

12   But we maintain that this is the most

13   natural reading. And in fact, for instance, when this

14   concern came up in Deal, that was confirmed the most

15   natural reading of the plain text. The Government would

16   actually turn that analysis on its head under these

17   circumstances.

18   JUSTICE SOTOMAYOR: Justice Breyer is

19   reading a bit what your co-counsel is advocating, what

20   Mr. Abbott is arguing?

21   MR. HORAN: No, Your Honor. I --

22   JUSTICE SOTOMAYOR: No?

23   JUSTICE BREYER: I mean, I don't know if it

24   makes any difference. I mean, has there ever been such

25   a case, where the prosecutor worked this in such a way

1   that he would produce this?

2   Are you aware if any such case ever

3   happened?

4   MR. HORAN: No, I'm not aware of that, Your

5   Honor, in part because the except clause is -- there

6   aren't that many instances of the except clause having

7   been actually applied.

8   JUSTICE SCALIA: There has never been any

9   incentive to do so, until we accept your interpretation.

10   Then there will be means to do so.

11   MR. HORAN: There may be -- Justice Scalia,

12   there may be some incentive do so, subject to other

13   constraints, including the -- the usual practice of

14   charging, for instance, most offenses as they come under

15   the transaction in the same indictment. There are --

16   will be counterincentives, to be sure.

17   Your Honor, for the -- in addition to the

18   fact that our interpretation does not involve, we think,

19   adding anything into the text that others must, we think

20   it establishes -- it advances an evident purpose that

21   Congress had in this, which was to ensure that a

22   defendant who is convicted under 924(c)(1)(A) receives

23   some sufficient minimum punishment.

24   After 1998, the 1998 amendments, section

25   924(c)(1)(A) was trafficking, in essence, in minimum

1   sentences. And that's what this is about. So this way,

2   a defendant will receive a sufficient minimum sentence

3   by way of 924(c) -- I see that my time is up.

4   Mr. Abbott will be represented by Mr. Ryan

5   at this time.

6   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

7   MR. HORAN: Thank you.

8   CHIEF JUSTICE ROBERTS: Mr. Ryan.

9   ORAL ARGUMENT OF JAMES E. RYAN

10   ON BEHALF OF THE PETITIONER IN NO. 09-479

11   MR. RYAN: Mr. Chief Justice, and may it

12   please the Court:

13   I would like to spend some time on the

14   second question in our petition, regarding whether other

15   firearms offenses are included within the scope of the

16   except clause.

17   But before I do, I would like to make a

18   couple of points about the first question, which is

19   common to our case and to Mr. Gould's.

20   Justice Sotomayor asked: Why isn't the

21   Government's reading the most natural? And the answer

22   is pretty simple. The Government's reading leaves one

23   half of the effect clause with absolutely no practical

24   effect.

25   The Government has, in its current

1   interpretation, suggested that the except clause applies

2   to one provision of law outside of 924(c). That is

3   3559(c). And yet with respect to that provision, the

4   except clause does absolutely no work, both for

5   practical reasons and because of the way 3559(c) is

6   written.

7   JUSTICE SOTOMAYOR: 930(c): A person who

8   kills any person in the course of bringing a firearm

9   into a Federal facility shall be punished as provided in

10   sections setting forth minimums for murder and

11   manslaughter. So it would also have an effect in

12   930(c), no?

13   MR. RYAN: It's not clear from the

14   Government's argument, Justice Sotomayor.

15   JUSTICE SOTOMAYOR: I wasn't sure why it

16   didn't list 930, but --

17   MR. RYAN: As I understand the Government's

18   argument, the sentence that -- the only sentence that

19   would count outside of 924(c) would be a sentence

20   specifically for a 924(c)(1)(A) --

21   JUSTICE SOTOMAYOR: I know, but its brief

22   does two formulations. It says --

23   MR. RYAN: Exactly right.

24   JUSTICE SOTOMAYOR: -- anything that affects

25   924(c); and then in other places in its brief it says

1   the -- "the 'except' clause refers to any higher minimum

2   sentence for possessing, using or carrying a firearm in

3   relationship to a drug or -- drug offense or a crime of

4   violence." Those are two different formulations.

5   MR. RYAN: That's exactly right, Justice

6   Sotomayor. And --

7   JUSTICE SOTOMAYOR: I am focusing on the

8   second formulation.

9   MR. RYAN: Okay. That point actually

10   demonstrates why the Government's justification for this

11   limitation doesn't hold up. As the Government argues at

12   one point, the reason to read "any other provision of

13   law" to include only sentences for 924(c)(1)(A) crimes

14   is because the "except" clause when it refers to this

15   subsection refers only to sentences for section

16   924(c)(1)(A) offenses.

17   Yet that is not the case. As this Court

18   indicated in O'Brien, 924(c)(1)(B) is a separate

19   offense. Well, if 924(c)(1)(B) can trigger the "except"

20   clause, and it's not the same offense as 924(c)(1)(A),

21   the Government's argument about excluding other offenses

22   that might be separate from 924(c)(1)(A) no longer holds

23   up.

24   The other difficulty with the Government's

25   reading, to go back to the practical point, is that if

1   you apply it just to 3559(c), it can have no effect

2   because as a practical matter no one can serve a term of

3   years after successfully completing a life sentence,

4   which is what's required under 3559(c); and 3559(c)

5   itself has a provision that, the "notwithstanding"

6   provision, that makes clear that only the life sentence

7   should be imposed when 924(c) is the third strike for

8   purposes of 3559(c).

9   That in turn just leaves future

10   applications, and there the Government's scenario under

11   which the language that currently has no effect might

12   have some effect is nothing short of far-fetched. It

13   would require Congress to amend the sentence of

14   924(c)(1)(A) outside of 924(c)(1)(A) and not indicate

15   how those two penalties should interact.

16   Now, if I could turn to the questions about

17   the transactional limitation which we suggest. The

18   point of suggesting that the "except" clause should be

19   limited to sentences for the same transaction is

20   suggested by some of the questions directed to Mr.

21   Gould's counsel. We think that it's the more natural

22   reading of the statute in part because of concerns

23   recognized by this court in the United States v. Deal,

24   namely that the statute is not designed and should not

25   be read to give prosecutors unreviewable discretion as

1 to when the minimum sentence in 924(c) ought to be

2 applied or not.

3   It also would preclude the equally odd

4 situation of a defendant being able to benefit from the

5 "except" clause in a multi-count indictment when the

6 defendant has -- faces a higher mandatory minimum

7 sentence for a completely unrelated -- unrelated charge.

8   JUSTICE ALITO: Where would we look to find

9 the definition of a criminal transaction for these

10 purposes?

11   MR. RYAN: You could look into 924(c)

12 itself. Our view is that it would be no different than

13 the transaction that would give rise to the 924(c)

14 charge itself, and so for that reason would necessarily

15 include the predicate offense or another firearms

16 offense.

17   JUSTICE ALITO: What if there were several

18 924(c) offenses committed during a rather brief period

19 of time? What if on the same afternoon an individual

20 engaged in a number of drug trafficking offenses and

21 during each of those used or carried a firearm? Would

22 they -- would they be part of the same criminal

23 transaction?

24   MR. RYAN: No. Just as different --

25 different transactions can lead to multiple 924(c)

21

1   charges, which is what happened in Deal, that could also

2   occur here.

3   JUSTICE ALITO: Well, you say different

4   transactions, but I'm looking for the definition of a

5   criminal transaction. The criminal law has labored with

6   this for a long time. It's not a self-defining concept,

7   is it, a criminal transaction?

8   MR. RYAN: No, it's not, but -- Your Honor,

9   but I don't see how it would be any more difficult to

10   determine the transaction than to look at what would

11   constitute the 924(c) offense. It would be the same set

12   of operative facts that could lead to a 924(c) charge

13   which would count as the transaction.

14   JUSTICE GINSBURG: Mr. Ryan, I thought that

15   you had three positions and now you are talking about

16   the second one, which is any greater minimum sentence

17   arising from the same criminal episode. But I thought

18   your first position was any greater minimum sentence

19   applicable to the defendant at sentencing.

20   MR. RYAN: That is Mr. Gould's position.

21   Our position is limited to the same transaction. Our

22   alternative position, which I would like to turn now --

23   JUSTICE SOTOMAYOR: -- charging --

24   MR. RYAN: Well, the way it would have to

25   work is that there would have to be a previous

1   conviction.

2   Now, if I could turn to the firearms

3   argument. Our argument here is straightforward.

4   JUSTICE SCALIA: Excuse me, before you go

5   on. Your last remark, it has to be a previous

6   conviction. So why doesn't that leave it in the hands

7   of the prosecutor whether to bring that conviction, that

8   other case, prior or subsequent?

9   MR. RYAN: I misspoke. Justice Scalia, you

10   are exactly right. It would include uncharged. It

11   would -- it would prohibit prosecutors from being able

12   to use charging instruments to determine whether 924(c)

13   would apply. I was thinking of a particular example,

14   but in the general case you are right. I apologize for

15   that misstatement.

16   Now, if I could just spend a little bit of

17   time on our second question. Our argument here is

18   fairly straightforward and fairly modest. And it relies

19   on the fact that 924(c) is essentially a firearms

20   offense, and the punishment provided in the different

21   paragraphs in 924(c) are primarily about firearms. And

22   so, in looking to determine the meaning of "any other

23   provision of law," it is quite natural, as both the

24   First Circuit recognized and as the Government

25   recognized in Whitley, the Second Circuit case, to

1   include provisions of law outside of 924(c) that punish

2   firearms offenses.

3   Now, to be sure, this particular limitation

4   is not commanded by the plain language of the statute

5   and rests, like the Government's argument, on context

6   and purpose. But the difference is that this argument

7   still gives some effect to the "except" clause. It

8   would apply, as here, to other firearms offenses outside

9   of 924(c) like the Armed Career Criminal Act.

10   JUSTICE ALITO: Well, it gives broader

11   effect. It gives broader effect to the "except" clause,

12   but the Government's argument gives effect to the

13   "except" clause, doesn't it?

14   MR. RYAN: It gives no --

15   JUSTICE ALITO: -- 3359(c) which was enacted

16   at the same time as the "except" clause, wasn't it, and

17   makes specific reference to -- to 924(c).

18   MR. RYAN: Two points, Justice Alito.

19   First, the Government's reading has no practical effect.

20   It leaves the "except" cause with no practical effect.

21   You could take the "except" clause away and there would

22   be no difference in terms of the sentence under 3559(c).

23   As for the enactment of 3559(c), the

24   Government's argument is actually different. The

25   Government argues that when 3559(c) was amended to

1   include possession --

2   JUSTICE ALITO: Yes.

3   MR. RYAN: -- it was at that point that the

4   except clause also entered into 924(c). The difficulty

5   with that argument, as we explained in our brief, is

6   that 3559(c) was already linked with 924(c) insofar as

7   both addressed use. And because 3559(c) and 924(c) were

8   already linked, and the "notwithstanding" provision

9   within 3559(c) indicated that if the 924(c) offense is

10   your third strike, you get the life sentence, that's it,

11   well, the fact that Congress then amended 3559(c) to

12   make another connection with 924(c) can't possibly

13   explain why there is a sudden need for the "except"

14   clause.

15   But the question is an -- is an important

16   one because it goes to the fact that the Government has

17   offered three different interpretations of the language

18   in this case. The first -- one of the first was in

19   Whitley, where it suggested "any other provision of law"

20   includes other firearms offenses outside of 924(c)

21   provided that they impose a consecutive sentence. That

22   argument was rejected for the idea that, instead, 924's

23   "except" clause actually applies to no existing

24   provisions of law; and now the Government argues that it

25   applies to one, 3559(c); and it has come up with a new

1   theory as to why the "except" clause exists in the first

2   place.

3   But that theory doesn't hold up, and the

4   Government's shifting interpretations, if nothing else,

5   suggests that the Government has not hit upon the most

6   natural reading.

7   JUSTICE GINSBURG: But you have offered

8   three different readings, so one can't say that this

9   statutory text has a clear meaning, which I think is

10   your first argument -- that it has a clear meaning. And

11   yet, we have Mr. Gould's reading and then the two

12   readings that you have offered us, same episode and same

13   gun.

14   MR. RYAN: Yes, Justice Ginsburg. We think

15   our first argument is the most natural and the clearest,

16   but I take your point; and the only response I would

17   make is, if shifting interpretations or different

18   interpretations suggest that at the end of the day the

19   language is ambiguous and grievously so, under the rule

20   of lenity, we ought to prevail. So I'm perfectly

21   comfortable with that conclusion.

22   If there are no further questions, I would

23   like to reserve the remainder of my time for rebuttal.

24   CHIEF JUSTICE ROBERTS: Thank you, counsel.

25   Mr. McLeese.

1   ORAL ARGUMENT OF ROY W. MCLEESE

2   ON BEHALF OF THE RESPONDENT

3   MR. MCLEESE: Mr. Chief Justice, and may it

4   please the Court:

5   A district court judge in --

6   JUSTICE SOTOMAYOR: Counsel, could I just

7   ask one simple question, the one I started with earlier,

8   which was, which of the two statements are you

9   advocating, that the "except" refers to a provision that

10   imposes a greater minimum sentence for violating 924(c)

11   explicitly, or are you saying the "except" clause -- and

12   I'm quoting from your brief, in two different places --

13   "The 'except' clause refers to a higher minimum sentence

14   for possessing, using a firearm in relationship to a

15   crime of violence or a drug offense?"

16   MR. MCLEESE: I don't think there needs to

17   be an explicit reference. I think that the "except

18   clause is triggered by an offense which has a greater

19   mandatory minimum and which has the same elements as and

20   is the same offense as a section 924(c) offense.

21   JUSTICE SOTOMAYOR: All right. If that's

22   the case, your adversary just said, Mr. Abbott's

23   attorney just said, that you don't believe that section

24   924(c)(1)(A) is trumped by 924(c)(1)(B) or by 18 U.S.C.

25   section 930(c). Is his allegation correct or is he

27

1   wrong?

2   MR. MCLEESE: He is incorrect.

3   JUSTICE SOTOMAYOR: Okay.

4   MR. MCLEESE: First, with respect to the

5   internal structure of 924(c), 924(c) as it was amended

6   in 1998 is a somewhat complex statute. It has a mix of

7   sentencing enhancements and elements which create

8   aggravated versions of the offense; but it is all a

9   single offense for double jeopardy purposes, for

10   purposes of what punishment to impose. And therefore,

11   the "except" clause operates consistent with the

12   definition I just suggested quite sensibly and tells a

13   district court judge imposing sentence if a defendant

14   has brandished a firearm and also discharged it, you

15   pick one of the 924(c) menu items, they are all a single

16   offense, and you impose a single mandatory minimum

17   sentence that is the greatest of those which are

18   applicable.

19   Now, with respect to 930(c) --

20   JUSTICE SOTOMAYOR: I'm sorry. So that if

21   he discharges a firearm and it says it is a sentence of

22   not less than 10 years and he -- and that firearm is

23   also a short barrelled rifle with a 10 year minimum,

24   does he get 10 years or does he get 20 years?

25   MR. MCLEESE: He gets 20 years.

28

1   JUSTICE SOTOMAYOR: How?

2   MR. MCLEESE: Because the "except" clause

3   says look to your defendant, look to see which --

4   whether there is any provision of law which carries with

5   it a greater mandatory minimum which punishes the

6   section 924(c) offense. In that instance there are two.

7   One of them provides for a 7-year mandatory minimum, one

8   provides a 20-year mandatory minimum.

9   JUSTICE SOTOMAYOR: So if it's a machine gun

10   where there is a 30-year minimum, does he get 40 or 30?

11   MR. MCLEESE: He gets 30. The "except"

12   clause operates internally to section 924(c) to tell the

13   district court judge, very helpfully in light of the

14   complexity of the provision: You impose one mandatory

15   minimum sentence for each 924(c) violation, whether

16   aggravated or less aggravated.

17   CHIEF JUSTICE ROBERTS: But that's not -- I

18   can't imagine a single district judge getting that

19   wrong. To think that, oh, my gosh, here it says 10

20   years if you discharge the firearms and here it says 5

21   years if you have one, which one do I use in a case when

22   it's discharged? You don't need this provision. Your

23   argument can't be that this language is to make sure the

24   district judge knows in that case to use the 10-year

25   rather than the 5-year?

29

1   MR. MCLEESE: That point, Mr. Chief Justice,

2   applies in support of our position, because everyone

3   agrees that the primary function, the first half of the

4   "except" clause, does exactly that. That's all it does.

5   It does nothing else. To the extent the "except" clause

6   says "except to the extent a greater minimum sentence is

7   provided by this subsection," the only function --

8   JUSTICE SCALIA: But that would include (b).

9   But that would include (b). (B) is part of the same

10   subsection, isn't it?

11   MR. MCLEESE: Yes.

12   JUSTICE SCALIA: So, you know, I think what

13   the Chief Justice says is very obvious when you are just

14   talking about C(1)(a), but it isn't obvious to me that

15   if -- if the firearm is discharged and in addition it's

16   a machine gun or destructive device, that you'd only get

17   the 30 rather than the 30 plus 10.

18   MR. MCLEESE: Quite so.

19   JUSTICE SCALIA: That isn't obvious to me.

20   And the "except" clause would -- would handle that.

21   MR. MCLEESE: Correct. And it's important

22   to realize --

23   CHIEF JUSTICE ROBERTS: Well, I guess things

24   are obvious to different people. I would have thought

25   it would be odd to say when there are increased minimums

1   that the highest minimum applicable isn't the one that

2   applies.

3   MR. MCLEESE: I agree with that, but it's

4   important to realize that another issue that a district

5   court judge might confront is whether you should

6   cumulate them so it should be, as Justice Sotomayor's

7   question suggests, that if there are several available

8   that you get 20 because it's a machine gun and 10

9   because it was discharged. And from the perspective of

10   busy district court judges, a provision which says in

11   figuring out how to sentence a 924(c) offender, you

12   don't have to look through this complex statute to

13   figure out what your sentencing enhancements, do some

14   double jeopardy analysis, all you need to do is simple

15   math. You are directed to look to, of all the ones that

16   are available, the one that is longest of the mandatory

17   minimums.

18   The point I was trying to make, though,

19   Mr. Chief Justice, is all of this, the idea that it

20   really isn't that critical even to clarify in the first

21   half of the "except" clause what to do, is consistent

22   with our position, which is the "except" clause all

23   together, both internally to section 924(c) and as it

24   reaches externally, is about clarifying something that

25   it may be true district court judges otherwise would

1   have been able to figure out had they done a lot of

2   analysis, but it makes it much simpler and the practical

3   utility of it is to clarify a sentencing judge's options

4   with respect to a statute that has been made much more

5   complex.

6   CHIEF JUSTICE ROBERTS: But your main -- the

7   meat of your argument focuses on 3559(c), right? There

8   is this significant provision out there that does

9   provide a greater mandatory minimum. And I just don't

10   see as a practical matter why people would worry about

11   that. Under 3559(c), you get life. And you are saying,

12   well, they put in the "except" clause to be sure that

13   the judge would add another 5 years at the end of a life

14   sentence.

15   MR. MCLEESE: Mr. Chief Justice, I think the

16   effect of the "except" clause is the opposite, which is

17   it makes sure that a judge imposes only life and does

18   not add additional sentences.

19   CHIEF JUSTICE ROBERTS: Yes, exactly. Yes,

20   I'm sorry.

21   MR. MCLEESE: And I agree, from the

22   perspective of a defendant, that may not be most

23   consequential. But this is a provision which, taken as

24   a whole, was clarifying not just externally to 924(c),

25   but also internally what district court judges should do

1   with a complex --

2   CHIEF JUSTICE ROBERTS: Okay. Well, just so

3   I make sure I understand, the basic point you are making

4   is that there are some things under your reading that

5   this deals with. One is the internal point, and we can

6   disagree as to whether that is necessary or not, and the

7   other is 3559(c), where it seems to me it doesn't make

8   any difference whether you are in there for life or life

9   and the additional 5 years.

10   MR. MCLEESE: I agree, it's not practically

11   significant to a defendant, although sentences of life

12   plus additional terms or consecutive life are not at all

13   uncommon in the code. But it is of significance to

14   district court judges who are trying to figure out what

15   sentence to impose. And this provision --

16   JUSTICE SOTOMAYOR: What do you do with

17   930(c)? Don't leave without answering my question.

18   MR. MCLEESE: Yes. I do not interpret

19   930(c) as subject to the "except" clause. I believe it

20   is a separate offense with different elements and under

21   the double jeopardy analysis that would apply it is

22   possible --

23   JUSTICE SOTOMAYOR: But your answer to me

24   was, you read the "except" clause as applying to any

25   higher minimum sentence for possessing, using or

1 carrying a firearm in relationship to a drug offense or

2 crime of violence. Isn't killing a person a crime of

3 violence?

4   MR. MCLEESE: Yes. Although 930(c) --

5   JUSTICE SOTOMAYOR: And isn't bringing of a

6 firearm into a Federal facility the carrying of a

7 firearm?

8   MR. MCLEESE: Yes. Although 930(c) does not

9 require the killing of a person, it extends to

10 attempts --

11   JUSTICE SCALIA: Where is 930(c)? Can you

12 tell me where it is --

13   MR. MCLEESE: I don't believe -- it is

14 referred to only in Petitioner Abbott's brief at a page

15 number I don't recall. It is not one of the provisions

16 that --

17   JUSTICE SOTOMAYOR: No, but I'm still trying

18 to understand your position, which is -- I read what you

19 said to me the "except" clause means and I'm applying it

20 to 930(c) and I couldn't figure out why you didn't list

21 it.

22   MR. MCLEESE: Because 930(c) does not

23 require an actual killing of a person. It extends to

24 conspiracy and attempt. Therefore, one can violate

25 930(c) without violating 924(c) and vice versa.

1   JUSTICE SOTOMAYOR: How?

2   MR. MCLEESE: By conspiring or --

3   JUSTICE SOTOMAYOR: A person who kills any

4   person --

5   MR. MCLEESE: Or by attempting to do so. So

6   930(C) has a broader reach because of these vicarious

7   and inchoate forms of liability. So a defendant could

8   be convicted separately of 930(c) and of 924(c). They

9   are not the same offense for double jeopardy --

10   JUSTICE BREYER: So there are two possible

11   readings now of the "except" clause where it `says --

12   the words are the subsection doesn't apply where a

13   mandatory -- where any other provision of law sets forth

14   a higher mandatory. Now, one possible reading, which is

15   yours, is what this means is that, judge, where you are

16   operating under that provision you just mentioned, and

17   the guy has committed two serious 924(c) things, and so

18   he is entitled to life -- this is just what the Chief

19   Justice said -- this is done to remind the judge don't

20   give him life plus 25 years, because it would be

21   25 years under this statute, not 5. That is one

22   possibly reading.

23   The other possible reading is, judge, where,

24   in fact, you have the underlying drug offense, that's

25   going to get you up into the 30s in the guidelines, it's

1   going to be probably 10, 5 years, or whatever it is.

2   You have a pretty high drug offense already. And now we

3   give him 5 extra years, say, for having a gun under

4   this, unless he's already gotten, say, a mandatory

5   minimum of 7 years.

6   And if he's already gotten the mandatory

7   minimum of 7 years, here's what's happened: Judge, turn

8   to the guidelines and the guidelines will tell you to

9   add 3 or 4 extra years. So in one -- those are the two

10   possible readings.

11   Now, the first reading to me makes very

12   little sense. The second reading to me says, yeah, this

13   is serving a purpose. It's once you are sure this guy

14   has to go to jail for 5, 6, 7, maybe 10 or 20 years for

15   sure, extra amounts are controlled by the guidelines,

16   which is administered by a judge. Now, if you just came

17   across that for the first time, which would you think

18   was most probable?

19   MR. MCLEESE: Well, I think when you place

20   this in the context of the 1998 amendments that enacted

21   the "except" clause, it is quite clear that the former

22   is more plausible. And the reason I say that, there are

23   really five features of the 1998 amendments that

24   illustrate that the "except" clause is not to be read as

25   eliminating any sentence for a section 924(c) offense,

1   but rather is clarifying which sentence to impose. The

2   first is that the 1998 amendments, setting aside the

3   "except" clause for a moment, in every respect

4   substantially increased the scope and severity of

5   924(c). It changed what had been mandatory sentences to

6   mandatory all the way to life. It responded to this

7   Court's decision in Bailey by increasing the substantive

8   scope of the provision. It increased the -- it created

9   increased mandatory minimums for 7-year and 10-year

10   offenses.

11   So it would be odd to think that in the

12   second half of a presumptively narrow exception clause,

13   Congress at the same time ran in the direct opposite

14   direction and had a substantial rollback of preexisting

15   section 924(c) sentencing provisions. And that's -- to

16   be clear, at the time of the 1998 amendments these

17   Petitioners would have been subject to the mandatory

18   minimum sentences that they received. They would have

19   been subject to 10 years in one of the cases for the

20   drug offense and 5 additional years mandatory and

21   consecutive under 924(c). For the other they -- he

22   would have been subject to 15 years for being a felon in

23   possession and an armed career criminal and 5 additional

24   under 924(c).

25   So one of the features that is key is

37

1   putting this in the context of the 1998 amendments which

2   were in every respect --

3   JUSTICE SCALIA: Wait, but it -- but it

4   does -- it does subject them to less, at least with

5   respect to those -- those enhancements set forth within

6   the subsection itself.

7   MR. MCLEESE: That is true. But that is not

8   a rollback of preexisting provisions. It's a way of --

9   JUSTICE SCALIA: Why?

10   MR. MCLEESE: Because none of -- in prior

11   924(c) law, there wasn't a body of law that would have

12   given anybody who would get the benefit of the "except"

13   clause under 924(c) a higher sentence. What all -- what

14   the "except" clause does is it makes clear under this

15   more complicated scheme that when we are increasing

16   these provisions, a 7 or 10, you shouldn't telescope

17   them all inside 924(c). You shouldn't add them all

18   together; you pick the highest.

19   And so it -- the "except" clause is not a

20   rollback. It is a way of accommodating and giving clear

21   direction to the complexity of the newly enacted

22   provision.

23   JUSTICE BREYER: When -- when did Congress

24   pass the statute that they amended in 1998? The one you

25   are saying -- I mean, it's a good point, you have a

38

1   point, that this would make it more lenient, the

2   interpretation. But the "it" was passed when?

3   MR. MCLEESE: Well, section 924(c) in its

4   original form I think was passed in the 1960s.

5   JUSTICE BREYER: So that's way before the

6   guidelines. So what they are trying to do now, in 1998,

7   is they are trying to -- see, in 1998 what they are

8   trying to do is take some of these old provisions and

9   reconcile them with this new system that has come along.

10   So I agree you have a point there.

11   But it -- it does make a certain amount of

12   sense, because what it is saying is, in these cases

13   where you have a WAPPO mandatory minimum anyway, so you

14   are sure he has got it, now the additional amount will

15   be controlled by the guidelines, which are subject to

16   not much discretion. They are pretty close to mandatory

17   minimums, but there is a little wiggle room.

18   MR. MCLEESE: On the general approach of

19   Congress under 924(c), it also bears note that in the

20   last 25 years Congress has amended section 924(c) six

21   times, and setting aside for a moment the "except"

22   clause, in all of those amendments Congress has

23   uniformly expanded its scope or increased the severity

24   of sentences. So the "except" clause would be the sole

25   provision in which Congress rolled back section 924(c).

1   And there are several other features of the 1998

2   amendment that make clear that that is not what Congress

3   did.

4   JUSTICE GINSBURG: How do you answer

5   Mr. Ryan's argument that you can read it this way, you

6   can read it that way; therefore, he wins under the rule

7   of lenity?

8   MR. MCLEESE: Well, this Court's cases make

9   it clear that the rule of lenity comes into play at the

10   end of the analysis only if there is grievous ambiguity

11   after all the considerations of statutory construction

12   have been considered. We haven't yet discussed all of

13   them and I think when all of them are discussed, there

14   is no grievous ambiguity. In fact, the reading that we

15   suggest is the only reasonable reading, all factors

16   considered.

17   And if I can turn back to a couple of other

18   features of the 1998 amendments, another feature is

19   the -- the title of the act itself, which is an Act to

20   Throttle the Criminal Use of Guns. And again it's just

21   inconsistent with the provision that has these features

22   and has that act, and it would be a substantial

23   important decrease in the mandatory minimum sentences

24   applicable to a large class --

25   CHIEF JUSTICE ROBERTS: But that's a

1 difficult -- you are saying because Congress wanted to

2 get tough on the people that use firearms in this

3 provision, every ambiguous clause should be read in a

4 way that makes it tougher on the criminal defendant?

5   MR. MCLEESE: I don't -- that would push the

6 argument too far. I think it is highly relevant to

7 construing this -- the statute as a whole, that that was

8 the clear overall function of that amendment.

9   Now there are two other features of the 1998

10 amendment, which are, it did as has been previously

11 noted -- also, the only other thing that Congress did in

12 the 1998 amendment, other than modifying section 924(c),

13 is it made a corresponding change in section 3559(c) to

14 -- to correspond. So we know that section 3559(c) was

15 front and center in Congress's mind as it was enacting

16 the 1998 amendments and it is very natural when Congress

17 is creating a more complex statute and giving district

18 court judges guidance about which mandatory minimums to

19 select under that statute, to mention and have language

20 that accommodates the fact that there is --

21   CHIEF JUSTICE ROBERTS: With respect to

22 3559(c) they were in fact being more lenient, not

23 stricter, right?

24   MR. MCLEESE: No, I think they were

25 clarifying --

41

1   CHIEF JUSTICE ROBERTS: I thought you said

2   earlier the purpose of this, what it does, is it makes

3   sure that you don't add five extra years on the people

4   who are sentenced to life.

5   MR. MCLEESE: I think it clarifies the

6   relationship, and in fact arguably it could have

7   clarified the situation in a way that would have been

8   beneficial to defendants. And the reason I say that is

9   when Congress enacted the first half of the "except"

10   clause, which said pick one and only one mandatory

11   minimum and impose it -- we're talking internally to

12   section act 924(c) -- if it hadn't mentioned 3559(c)

13   there could have been the idea that if there -- if

14   Congress didn't direct the same approach with respect to

15   3559(c), there is an implication that in fact you should

16   impose both.

17   And so what it really was doing was

18   clarifying what would have been unclear. And it is

19   again, only half of a presumptively narrow provision

20   which is just clarifying the relationship --

21   CHIEF JUSTICE ROBERTS: Which is just saying

22   when you get life, or you get 5, just serve life, don't

23   serve the extra 5.

24   MR. MCLEESE: Yes. Yes, but it's not saying

25   that to defendants. It's saying that to busy district

1   court judges who just need to know in a simple, clear

2   way, what am I supposed to -- what sentence am I

3   supposed to --

4   JUSTICE SCALIA: That's the only thing that

5   that additional language which says, "otherwise provided

6   by this subsection or by any other provision of law" --

7   why didn't they just mention 3559(c)?

8   MR. MCLEESE: Well --

9   JUSTICE SCALIA: That's the only thing it

10   covers, that tiny little thing which has no effect at

11   all, except for the benefit of the busy district judges,

12   you say. I -- I find that quite implausible.

13   MR. MCLEESE: Well, remember that it was --

14   although it is not hugely consequent actual to

15   defendants, it was a provision that Congress was

16   directly considering then. But there is another

17   function, which is it creates a default rule for future

18   similar provisions like 3559(c). And so there -- and

19   had -- again -- so it's not limited to its function with

20   respect to 3559(c), it also serves, as Congress often

21   provides, a default rule.

22   And so again there is a fifth feature of the

23   1998 amendments for those of whom this is concern, which

24   is the legislative history of the provision strongly

25   corroborates our interpretation.

1   JUSTICE BREYER: It's not strongly. The --

2   what is it an example? You're saying this thing also

3   serves the purpose that perhaps someday Congress will

4   pass a new statute, a totally different one, and a busy

5   district judge might think that he should add the 5 or

6   25 years from this provision on to whatever sentence

7   this hypothetical new statute provides, but this will

8   tell him not to do so. Did you have anything in mind?

9   MR. MCLEESE: Well, I -- there are -- there

10   are other provisions that, like 924(j), which do provide

11   sentences for 924(c) offenses that are codified

12   elsewhere in the code. And with respect to other

13   offenses that is also quite common. So there is nothing

14   implausible about the idea that --

15   JUSTICE BREYER: I take it in those other

16   sentences there are other thing in the code, and the odd

17   thing about this one is there no other thing in the code

18   except the one we have been discussing. And so I just

19   wondered if there -- was there at the time anybody

20   thinking of adding some new thing, that this might have

21   been applicable to? Or have you come across anything?

22   I take it your answer is no.

23   MR. MCLEESE: I'm not aware that -- that

24   Congress had some particular pending legislation in

25   mind. My point more generally, though, is that it is

44

1   quite common for Congress to provide penalties for

2   offense A in a different section, and so creating a

3   default rule is a perfectly reasonable thing for

4   Congress to have done while it was clarifying the

5   internal relationships among the various 924(c)

6   provisions and the provision in 3559(c) which is front

7   and center in front of it.

8   With respect to the legislative history the

9   "except" clause language was proposed by Senator Jesse

10   Helms. In the legislative provision there is nowhere

11   any comment by anyone suggesting that anyone understood

12   it as rolling back preexisting section 924(c) penalties

13   or as reflecting a new policy different from the

14   fundamental policy of section 924(c), which has always

15   been: Defendants who create drug trafficking offenses

16   or violent crimes and who involve a weapon will get an

17   additional --

18   CHIEF JUSTICE ROBERTS: Is there any

19   evidence in the legislative history that the reason they

20   put this in was to ensure that people who got life would

21   not get life plus five years?

22   MR. MCLEESE: There is no explicit reference

23   to that. But that is, I think, a good inference from

24   the fact that all of the other explanations are far more

25   implausible.

45

1   And there is something -- there are two

2   things which support that inference more specifically,

3   one of which is, again, that Congress did have in front

4   of it section 3559(c) and was amending it.

5   The second is that the sole reference

6   anywhere in the legislative history to the except clause

7   is in the testimony of a witness at a hearing, and what

8   that witness said about it was that it will prevent

9   confusion with other provisions.

10   And so there is, I think, a strong

11   indication --

12   JUSTICE SCALIA: One witness at a hearing?

13   At a hearing? And you really think that the rest of the

14   Congress knew about that hearing?

15   MR. MCLEESE: I don't. My point is really

16   more the negative, which is if the except clause, in the

17   second half of an exception that is in its first part

18   intended to clarify, was instead a major policy shift

19   from the preexisting policy of section 924(c),

20   additional mandatory consecutive sentences. And instead

21   of shift over to sentences which we will try to adjust

22   or ameliorate in light of other --

23   JUSTICE BREYER: No, no, no. It's a shift

24   over to the sentencing guidelines which say a person

25   like this one will receive an extra three or four or

1   five years depending on the circumstances. Will receive

2   it, just like a mandatory. Unless, of course, it is an

3   unusual case. That's what it's a shift to.

4   Am I wrong?

5   MR. MCLEESE: Two responses. Two responses,

6   Justice Breyer, one of which is that Congress has

7   amended 924(c) both before and after this provision, and

8   it's clear that Congress is not shifting from a

9   mandatory minimum regime to a regime that -- where the

10   guidelines are relied upon to provide the minimum

11   sentence that Congress requires.

12   And it is a shift not just to a guidelines

13   regime, because if this a major policy shift into a

14   different world, there -- it poses a question of

15   statutory construction as well, not just about

16   guidelines.

17   And that's the next topic, which is --

18   JUSTICE SCALIA: Well, wait. I mean, the

19   guidelines can't be, as Justice Breyer said, just like a

20   mandatory. They can't be, can they?

21   JUSTICE BREYER: I did.

22   MR. MCLEESE: They could not have been, even

23   in the pre-Booker world. Certainly, in the post-Booker

24   world, they cannot.

25   JUSTICE SCALIA: Advisory.

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1   MR. MCLEESE: But the point is that

2   Congress -- if Congress was shifting in the except

3   clause, the question is, what is the nature of that

4   policy shift?

5   If you were going to try to reduce 924(c)

6   sentences to accommodate sentences on other provisions

7   of law, instead of just making them an add-on always,

8   then there is a question: What policy should you pick?

9   Should you pick any other sentence the defendant is

10   facing at this sentencing? Should you pick any other

11   sentence arising out of this transaction?

12   That is not a guidelines issue. That's a

13   question of: What is the policy reflected by the

14   statute?

15   CHIEF JUSTICE ROBERTS: You should pick any

16   other violent or drug trafficking offense that already

17   provides a higher minimum.

18   MR. RYAN: That --

19   CHIEF JUSTICE ROBERTS: No, it seems to me

20   the perfectly natural reading to say: Look, we are

21   providing some minimum sentences when this happens, when

22   this is the violent crime and you use a gun, but if you

23   have already got a higher sentence for the violent

24   crime, then this doesn't apply.

25   MR. MCLEESE: That is a possible policy, to

1   be sure, but one thing: It's certainly not the only

2   reasonable policy. You could focus on the transaction

3   or you could focus on what the defendant is facing at

4   the sentencing. All those are among the policy options

5   you could consider.

6   And what is interesting is that Petitioners

7   can't agree on those policy options. And they can't

8   agree on the policy options because section 924(c) has

9   no guidance about it. And the reason section 924(c) has

10   no guidance about it is because Congress was not making

11   the policy choice at all. Congress was simply

12   clarifying how to implement the preexisting policy under

13   924(c), which is always imposed, for a section 924(c)

14   violator, an additional separate mandatory minimum

15   sentence.

16   But here is advice about how to do that.

17   Here is advice about how to do that internal to section

18   924(c). Here is advice about how to do that external to

19   924(c) under 3559(c) and with a default rule for other

20   similar provisions. That is the -- the modest objective

21   that Congress was attempting to achieve. And as

22   everyone agrees --

23   JUSTICE SCALIA: Excuse me. For other

24   provisions anywhere in the code? I mean, regardless of

25   whether those provisions are being prosecuted in this

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1   particular indictment?

2   I mean, you --

3   MR. MCLEESE: No --

4   JUSTICE SCALIA: You are saying that the

5   other side has to say: Well, it's only those that are

6   in this particular criminal transaction, or only those

7   in the particular indictment.

8   Do you escape that necessity?

9   MR. MCLEESE: I think we do, and the reason

10   we do is because, in our view, this provision operates

11   only when you are talking about prosecution for the same

12   offense in double jeopardy purposes. And so it's not

13   possible for, under our submission, for the Government

14   to prosecute somebody for one of these variants of

15   section 924(c) and then come back again later and

16   prosecute again and then manipulate the overall

17   structure of sentences, because they are the same

18   offense.

19   If you move outside that, into things that

20   are not the same offense for double jeopardy purposes,

21   then the prospects do open up for irrational patterns of

22   outcome based on the order in which things are

23   prosecuted, and in addition, irrational patterns of the

24   mandatory minimums based on --

25   JUSTICE SOTOMAYOR: So how is your reading

1   different from Mr. Abbott's?

2   MR. MCLEESE: Mr. Abbott has two readings,

3   and our reading differs from each of them. The first of

4   Mr. Abbott's readings is transactional in nature. Ours

5   is focused on the section 924(c) offense itself.

6   The second of our readings is -- the second

7   of Mr. Abbott's readings is focused on a firearm, just

8   the fact that a firearm is involved. And again, ours is

9   focused on the use of a firearm in a way that

10   constitutes the section 924(c) offense. So those are

11   the differences.

12   But if I could just point out the other

13   anomalies, there are two other anomalies that we have

14   not yet touched upon. One of them is that Petitioner's

15   submissions create anomalous patterns of floors of

16   statutory minimums, as we've discussed in the briefs.

17   If a defendant under Petitioner's

18   submission, the principal submission, has committed a

19   drug offense that carries a five-year mandatory minimum

20   sentence and brandishes a firearm, it is -- carrying a

21   seven-year minimum, the floor is 12 years. If that

22   defendant's drug offense is more aggravated and carries

23   a greater sentence so that there is a 10-year mandatory

24   minimum, the overall mandatory minimum, under

25   Petitioner's submission, reduces to 10.

1   And there is the further anomaly that for

2   offenses that are different, the Petitioner's submission

3   is that the defendant will end up, although adjudicated

4   guilty of a section 924(c) offense, with no sentence

5   whatsoever. There will be a free-floating adjudication

6   of guilt.

7   And because the defendant, let's say, is a

8   felon in possession and is sentenced under the Armed

9   Career Criminal Act, when the judge goes to sentencing,

10   the judge, on Petitioner's view, says: I will give you

11   15 years under the Armed Career Criminal Act; that

12   triggers the except clause, and therefore, I impose no

13   sentence whatsoever under section 924(c). That also is

14   an anomaly.

15   CHIEF JUSTICE ROBERTS: As Justice Breyer

16   has pointed out, he can take that into account in

17   figuring out what sentence he would want to impose

18   beyond the greater minimum.

19   MR. MCLEESE: That is true. My point about

20   the anomaly is just that it is very strange, to my

21   knowledge unheard of, to have a judge go to sentencing

22   and have a series of adjudications and to tell the judge

23   as to one of them that it's not the greater or lesser

24   included offense of another; you don't even need to

25   impose a sentence on that adjudication. The backdrop

1   basic assumption is, on each of the adjudications, you

2   impose a sentence.

3   Now, that is not true if offenses are

4   greater or lesser or are the same offense, for double

5   jeopardy purposes. But under Petitioner's submission,

6   that is true with respect to offenses like being a felon

7   in possession of a firearm and being someone who

8   violated 924(c) that are different offenses in double

9   jeopardy law and have always been given separate

10   judgments, separate punishments.

11   If the Court has no further questions, we

12   would request that the judgements below be affirmed.

13   CHIEF JUSTICE ROBERTS: Thank you,

14   Mr. McLeese.

15   Mr. Ryan, you have three minutes remaining.

16   REBUTTAL ARGUMENT OF JAMES E. RYAN

17   ON BEHALF OF PETITIONER IN NO. 09-479

18   MR. RYAN: I would like to make two points

19   on rebuttal.

20   There has been a great deal of discussion

21   about the general purpose of 924(c). But as this Court

22   has indicated, the best indication of a statute's

23   purpose is the statute's language, and although the

24   Government argues that the sole purpose of 924(c) was to

25   enhance punishment for defendants, the except clause

1   belies that simplistic assertion of the purpose. The

2   except clause actually mediates the punishment that is

3   provided in 924(c).

4   The Government's reading, at the end of the

5   day, wants to rely on purpose in order to give no effect

6   to the except clause. The idea that 3559(c) is an

7   instruction to busy district court judges, even putting

8   aside the impossibility of serving an additional

9   sentence after completing a life sentence, doesn't hold

10   up, because the Government never disputes the fact that

11   3559(c) begins with the statement, "Notwithstanding any

12   other provision of law."

13   So the busy district court never needs to

14   turn to the except clause in 924(c)(1)(A) to know that

15   you impose a life sentence when the third strike is a

16   924(c).

17   JUSTICE ALITO: Whenever Congress uses a

18   phrase like that, "notwithstanding any other provision

19   of law," does that mean that Congress must think that

20   there is some provision of law that falls within that?

21   MR. RYAN: Possibly, yes. And here, the

22   other provision of law would be 924(c), and --

23   JUSTICE ALITO: Doesn't Congress commonly do

24   that to make sure that something covers any existing

25   statute there might be that would fall within that,

1   without necessarily saying: Well, there are two of

2   them -- if there are two, maybe there are three? Going

3   through the entire code to find out how many there might

4   be, or if there is any?

5   MR. RYAN: Yes, Justice Alito, and that is

6   consistent with my point, is that --

7   JUSTICE ALITO: It is not consistent with

8   your main argument about the except clause, is it?

9   MR. RYAN: Well, yes, it is, because the

10   except clause would also apply to any other provision of

11   law.

12   JUSTICE ALITO: No, but your argument is the

13   except clause has to have some pretty substantial

14   effect, or otherwise, the "any other provision of law"

15   part of it -- otherwise, they wouldn't have put it in.

16   MR. RYAN: Oh, I apologize. I misunderstood

17   your question.

18   The "notwithstanding any other provision of

19   law," in the context of 924(c), would not have any

20   effect if the except clause was considered first. But

21   3559(c) applies to many other triggering offenses and so

22   with regards to those, and the Government has not

23   suggested that 3559(c) has -- has no effect.

24   The last point I would like to make is that

25   there is no doubt that regardless of one's view about

1   mandatory minimum sentences as a matter of policy, no

2   one doubts that Congress has the authority, if it

3   chooses to exercise it, to stack one mandatory minimum

4   sentence on top of another.

5   But as this Court's cases make clear,

6   Congress, under the Rule of Lenity, needs to make that

7   choice clear. And if nothing else, the Government's

8   shifting views indicate that Congress has not exercised

9   that choice clearly in this case.

10   CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11   The case is submitted.

12   (Whereupon, at 12:06 p.m., the case in the

13   above-entitled matter was submitted.)

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